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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

PETE WILSON, Governor of the State of California; GRAY DAVIS, State Controller of the State of California; KATHLEEN BROWN, State Treasurer of the State of California; and THOMAS W. HAYES, Director of the Department of Finance, State of California,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Third Appellate District

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BRIEF AMICUS CURIAE FOR 14 SEPARATE PUBLIC EMPLOYEE RETIREMENT SYSTEMS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE FOR 14 SEPARATE PUBLIC EMPLOYEE RETIREMENT SYSTEMS IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the public employee retirement systems whose names appear in the footnote below [1] file this brief of *amici curiae* in

[1] The Louisiana State Employees' Retirement System; The New Hampshire Retirement System; The Utah Employees' Retirement System; Board of Retirement, Los Angeles County Employees' Re-

support of petitioners.[2] Each of the 14 state or local retirement systems appearing as *amici curiae* in support of petitioners operates a retirement system that is regarded under local law as a trust fund and as having established a contractual obligation to public employees to provide a retirement system that includes benefits funded in part or in whole by employer contributions. As such, they are directly affected by the constitutional issue raised in the *Claypool* case, namely, whether a state or local governmental agency may impair its own contractual obligations to its public employees solely in order to save money in times of chronic budgetary stress.

State and local jurisdictions have faced and currently face budgetary problems and *amici curiae* have observed governmental efforts to solve those problems within their own jurisdictions and elsewhere by invading public pension funds to balance operating budgets. The law in all of these jurisdictions contains statutory or constitutional provisions that have traditionally been held to protect the contractual rights of retirees and active contributing members of the respective plans, but that protection is now threatened by the governmental action upheld against constitutional attack in the case before this Court.

This issue is of immediate concern to retirement systems throughout the United States because many state and local governments are facing budgetary constraints

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tirement Association; The San Bernardino County Employees' Retirement Association; The Connecticut Retirement and Trust Fund; The Oklahoma Public Employees Retirement System; The Oklahoma Uniform Retirement System for Justices and Judges; The San Jose Federal City Employees Retirement System; The San Jose Police and Fire Department Retirement Plan; The City Employees Retirement System for the City of San Diego; The Teachers' Retirement System of the State of Illinois; The Illinois Municipal Retirement Fund; and The Iowa Public Employees' Retirement System.

[2] Letters of consent from all parties have been filed with the Clerk.

and are increasingly looking to pension trust funds to redress their budgetary imbalances.[3]

Because of the experience of these systems with past constitutional issues raised in their own and other juris-

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[3] American Association for Retired Persons, "Toward a Just and Caring Society: The AARP Public Policy Agenda 1992," stating in part,

> "A current pension issue of concern for the states is attempts by governors and/or legislatures to use public employee pensions as funding vehicles for projects unrelated to the welfare of public employees and retirees. The majority of states are facing deficits and practically all states are required by law to balance their budgets, and so in addition to increasing taxes, some states are resorting to 'raids' on their public employee pension funds to finance spending initiatives and other spending commitments. Other states are revising the actuarial assumptions underlying their pension programs to show a more favorable funding situation and thereby justify diverting pension monies to other issues. . . .
>
> "1. States and other governmental entities should ensure that their retirement systems are actuarially sound and administered in a prudent manner that is solely in the interest of employees and beneficiaries.
>
> "2. Public employee pension funds must be safeguarded against use by governments seeking non-tax ways to increase revenues. Such actions are short-sighted and undermine the retirement security of millions of Americans who have come to count on these funds."

See also, PERSIST: (Public Employees Retirement Systems Issues Strategies and Tactics), newsletter of the National Conference On Public Employee Retirement Systems, Vol. 4, No. 2 (Sept. 1992) page 3, "Report From The Secretary Of Constitutional Concern," commenting as follows on the *Claypool* decision that is the subject of the Petition for certiorari:

> "Of concern is the size of the raid involved, almost $2 Billion, and the lower courts decision, which as [it] stands, encourages and condones like actions in other state and municipal jurisdictions. Of importance, therefore, is the potential risk and empty promises, which threaten current plan participants' employee packages. NCPERS continues to monitor this case, and if the writ of certiorari is granted, will once again substantiate our legal position to the United States Supreme Court to ensure the preservation and the integrity of public retirement systems."

dictions, the *amici* are very familiar with the issue presented, and believe that their views will be of assistance to this Court and will present a broader picture of the necessity for this Court's review.

STATEMENT

Amici curiae support petitioners' efforts to obtain Supreme Court review of the California Court of Appeal's decision upholding a 1991 statute in which the California legislature sought to resolve its current operational fiscal problems by using public retirement trust funds. It was the third time within ten years that the California legislature had sought to deal with fiscal problems by interfering with the flow of employer contributions to public pension funds.[4] This time the legislative interference with the pension fund was more detailed: (1) it repealed a previously enacted COLA program and substituted another, reduced benefit that would cost less money; (2) it used the retirement trust fund previously dedicated to the preexisting COLA program to pay employer pension contributions until the fund was used up; and (3) it eliminated the trustees' independent power to make actuarial decisions, and substituted a political appointee actuary, responsible only to the principal obligor of the fund.[5]

Although the state's purpose to correct its current budgetary imbalance was undisputed, the court below

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[4] *See Valdes v. Cory*, 189 Cal.Rptr. 212 (Ct.App. 1983) (rejecting employer's attempted use of money from a retirement fund reserve to replace state contributions), and *California Teachers Ass'n v. Cory*, 202 Cal.Rptr. 611 (Ct.App. 1984) (rejecting governor's "blue-line" reduction of appropriation for state contribution to teachers retirement system in order to use the money for "other educational purposes").

[5] On November 3, 1992, California voters restored the independence of the actuarial decisions by the passage of Proposition 162, the California Pension Protection Act. However, the use of trust funds by the state to pay its contributions remains uncorrected and ongoing.

held that any impairments to the contractual rights of employees were constitutionally permissible against the challenge to the statute primarily based on the U.S. Constitution art. I, § 10 (the "Contract Clause").

The factual background and proceedings below are adequately summarized in the Petition at pages 4 through 9 and will not be repeated here.

ARGUMENT

I. THE NATIONAL SIGNIFICANCE OF PUBLIC PENSION PLANS—TO THE EMPLOYEE MEMBERS, TO THE PUBLIC EMPLOYERS, TO THE TAXPAYERS AND TO THE NATION'S CAPITAL MARKETS—JUSTIFIES SUPREME COURT REVIEW OF A DECISION THAT SO DIRECTLY IMPACTS THEM

The overwhelming growth in the size of both the assets and the liabilities of public pensions in the 1980's makes their protection from budgetary raids a matter of national significance and necessity. The data set forth below show that public employee retirement systems loom large in this nation's economy. The funds are big; their membership is big; they provide the main source of retirement savings for their membership; and they are of critical importance to the taxpayers and to the nation's capital markets.

As of 1987 there were 201 state-administered public employee retirement systems and 2,213 locally administered systems, for a total of 2,414 systems.[6] These plans cover everyone from administrative and clerical public employees to police and fire personnel, teachers, judges, transit workers and other special district employees.[7]

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[6] U.S. Bureau of the Census, 1987 Census of Governments, Vol. 4, No. 6, *Employee Retirement Systems of State and Local Governments* (D.C. U.S. GPO 1988), at xii.

[7] *Id.* at 19.

Their number exceeded (as of 1987, the latest figures available) 11.7 million active members.[8]

In 1987, those funds held approximately $808 billion in assets,[9] growing to over $911 billion by the end of the second quarter of 1992.[10] Despite this immense total of assets, the pension assets were *exceeded* by the pension benefit obligations that they are designed to secure by an average of 15%, based upon a survey conducted in November 1991.[11] If pension underfunding grows, it will become a problem not only for the funds, but also for the taxpayers who will be called upon to pay for the unfunded pension promises made by public officials. The price to be paid in the future will be even higher if present funding obligations are ignored because then taxpayers will have to make up not only the contributions, but also the earnings that the contributions would otherwise have brought to the funds.[12]

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[8] *Ibid.*

[9] Board of Governors, Federal Reserve System, Flow of Funds Accounts: Financial Assets and Liabilities, Year-End 1967-1987.

[10] *Id.*, Second Quarter 1992 Annual Revisions, at 96.

[11] Survey of State and Local Government Employee Retirement Systems (Public Pension Coordinating Council, Washington D.C. Nov. 1991) at xiv.

"Public Employee Retirement Plans—The Nature Of The Employees' Rights," 1968 Ill. L. Forum 32: "The legal status of employees' rights assumes special significance in the light of the vast number of public employees who have coverage under state or local plans and the enormous fiscal obligations assumed by the public under these plans."

[12] "The Great Pension Robbery," Fortune, Jan. 13, 1992, at p. 76, stating:

> "The immediate victims of any cut in contributions or attachment of assets are the public employees whose retirement funds are being raided. But taxpayers may be on the hook too: they could have to make up the difference if, thanks to the raids, public plans lack the wherewithal to pay retirement benefits in the future."

Continued

In 1987, public pension assets represented 25.1% of total pension fund assets, with the remainder represented by union and corporate funds.[13] That percentage has grown, and today's $911.2 billion now represents 32.9% of total pension fund assets.[14] Pension funds have thus become a major source of the nation's capital.[15] Because of the importance of both their assets and liabilities and the interests of pensioners and of future taxpayers, the constitutional standard for protecting public pension funds is an issue of national significance that deserves review by this Court.

II. THE DECISION BELOW SHOULD BE REVIEWED BECAUSE IT IS THE LATEST AND LARGEST EXAMPLE OF THE INCREASING ABUSE OF PUBLIC PENSION FUNDS BY THEIR EMPLOYER SPONSORS

In almost every jurisdiction, including California, pension funds are treated as trust funds, and the Board members or others who administer the funds are re-

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[12] Continued

Chicago Tribune, Monday, May 20, 1991, Perspective, p. 10:

> "TRS [Teachers' Retirement System of Illinois] has never been funded on a sound basis. Reduced state contributions are being made into the accounts of employees, contributions that will have to be paid by future taxpayers at much higher cost. As of June 1990, the unfunded accrued liability of TRS was $5.58 billion. The underfunding of the public pension systems each year is creating another hidden debt for future taxpayers."

[13] "Our Money's Worth," Report of the Governor's Task Force on Pension Fund Investment (New York State Industrial Cooperation Council, June 1989) at 1.

[14] *Op. cit. supra*, n.9 at 96.

[15] "Our Money's Worth," *supra*, n.13, at 2. *See also* Hearing of the U.S. Senate Labor Committee, September 29, 1992, Testimony of Felix Rohatyn, Economist, Lazard Freres:

SEN. KENNEDY: I'm particularly interested in the role of the pension monies.

MR. ROHATYN: Yes. Public and private pension funds are the greatest accumulation of assets and savings in this country . . . .

garded as trustees and fiduciaries.[16] However, this protection will prove illusory if states can abrogate their statutory and constitutional obligations to treat pensions as trusts in order to use trust funds to balance their budgets. This case requires review because it is the largest and most egregious example of the increasing efforts by government to use retirement money to fund current operating expenses. This time the government is actually using retirement trust funds to pay its bill to the fund, despite the fact that it is contractually bound by the exclusive-benefit rule not to use trust assets for its own benefit.

In 1977, a law review note warned that the possibility of employer abuse of public pension funds was greater even than that among private pension plans, and that the possibility was becoming a reality.[17] The reality of that abuse has grown as the funds have grown from

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[16] *See* "Fiduciary Responsibility Requirements of the Pension and Retirement Plans For State Employees," Cong. Research Serv. Report 88-614 A (August 8, 1988), *passim*, noting fiduciary responsibility provisions, investment practices, and penalties for the fifty states; "Public Pension Plans: The Issues Raised Over Control of Plan Assets," Cong. Research Serv. Report (May 15, 1990) at 50, stating: "[A]ll states have a strong body of common trust laws as well as statutory trust laws to protect the financial integrity of pension trust funds."; "Fiduciary Duties and Other Laws Applicable to Public Retirement Systems," (National Council on Teacher Retirement, September 1992), *passim*, describing, separately as to each state, and reaffirming that "All states have either common law or statutory trust remedies." As to the application of common law trust principles to public pension trusts, *see, e.g., Board of Trustees v. City of Baltimore*, 562 A.2d 720, 739 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990), annot., 103 Harv. L. Rev. 817, analyzing the pension fund trustees' duty of loyalty in terms of common law trust principles in passing upon a South Africa divesture statute; *Hittle v. Santa Barbara County Employee Retirement Ass'n.*, 703 P.2d 73 (Cal. 1985), imposing duties on retirement association officers as trustees under California private trust law.

[17] Note, *Public Employee Pensions in Time of Fiscal Distress*, 90 Harv. L. Rev. 992 (1977), first quoting a 1976 congressional task

1977's estimate of over $100 billion [18] to 1992's Federal Reserve figure of $911.1 billion.[19] The financial problems of state and local governments have caused those governments to turn to public pension funds—held in trust to provide for retirement in the *future*—as a source of funds to meet the operating needs in the *present*, either by avoiding contributions or by arranging to take retirement savings to meet the state's current year operating expenses.

In 1977, the law review note spoke in terms of abuses by "alter[ing] the benefit and eligibility structure." [20] Today, the methods governments devise to use the public pension trust funds for their present needs are much more varied and ingenious:

(1) they may attempt to reduce benefits; [21]

(2) they may attempt to change actuarial funding methods in order to delay current pension contributions,

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force finding that "[t]he absence of any external independent review has perpetuated a level of employer control and attendant potential for abuse unknown in the private sector," and then stating:

"This 'potential for abuse' is becoming a reality in many areas. With public employee pension systems absorbing an increasingly large share of state and local revenues, financially troubled governments have begun increasingly to look to these systems as a source of fiscal relief."

[18] *Id.*, 90 Harv. L. Rev. at 32, n.2.

[19] Note 9, *supra*.

[20] *Op. cit. supra*, n.17 at 993.

[21] *See, e.g., Wisconsin Ex. rel. Cannon v. Moran*, 321 N.W.2d 550 (Wisc. 1982) (holding invalid a 1979 statute (as an impairment of contract) which sought to reduce state salaries of judges dollar-for-dollar by benefits they received under a county pension plan; the statute's purpose (*inter alia*) was to "reduce the costs imposed upon the Wisconsin public employee retirement systems and the public employers"); *Claypool v. Wilson* (Petition, App. A) (eliminating a brace of COLA programs and replacing them with a lesser program of asserted greater permanence).

and by so doing divert the public funds thus "saved" for non-pension purposes;[22]

(3) they may reduce annual contributions by the employer to the public retirement system;[23]

(4) they may raise investment return assumptions (which correspondingly lowers current employer contributions by assuming that existing funds already in the system will make more money than had been previously estimated);[24]

(5) they may deliberately underfund the pension plan;[25]

(6) they may transfer retirement trust funds out of trust and into general use accounts;[26] or

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[22] *McDermot v. Regan*, 587 N.Y.S. 2d 533 (1992), holding that statute seeking to change from aggregate cost method (the actuarial funding method used since 1921 to determine annual contributions by public employers to the common retirement funds) to projected unit credit method constitutes an "unconstitutional attempt to divest public employees of [a] contract right".

[23] "States Seeking Aid on Budgets From Pensions," NY Times July 21, 1991, sect. 1, pt. 1, p. 1, col. 1, describing how "At least 18 states . . . have delayed or reduced payments to their pension plans in the last two years, or are considering doing so." *See also* description of Texas rate reductions in Appendix A, p. 5a, *infra*.

[24] N.Y. Times article, *supra* n.23, Subhead "Tinkering With Assumptions."

[25] 1967 Report of the Illinois Public Employees Pension Laws Commission, Appendix B, Table 2, *cited in* R.G. Cohn, "Public Employee Retirement Plans—The Nature of the Employees' Rights," 1968 Ill. L. Forum 32, 33 n.4., describing how Illinois' state and local funds had accrued liabilities of just under $3.6 billion at the end of 1966 and net assets of approximately $1.65 billion, leaving an actuarially computed deficiency of approximately $1.95 billion as a public obligation. Compare *Crain's Chicago Business*, August 17, 1992, "Finance" section, asserting that "unfunded liabilities of Illinois will mushroom by 2020 to a projected $51 billion from the current $11.7 billion" and stating that "at least one of the state's five pension funds will go under by 2008."

[26] See "Statement of Facts" in the *Sklodowski* brief before the Illinois Supreme Court, Appendix A, page 3a below.

(7) they may offset their debt to the system by using funds already in the trust to pay their obligations to the trust, as in the case before the Court.

Claypool v. Wilson may be the biggest and the worst, but it is not the only example of misuse of retirement funds; if this sort of abuse is allowed to stand, it presages much more of the same conduct by state and local governments. In 1990 and 1991, public pension funds experienced a variety of threats when governments sought to divert pension trust funds, or divert money otherwise required to pay pension contributions to other purposes. They ranged from changes in actuarial assumptions or in the methods by which they were determined (so as to lower present contribution amounts—while raising those in the future); to shifts in the power of actuarial computation to those who have an economic interest in controlling it; to changes directly affecting the frequency or amounts of employer contributions; or to changes resulting in direct transfers or mandatory "loans" of trust fund money to the public employer. A more detailed description of these changes appears at Appendix A below.

Court review is necessary to halt these abuses that threaten the security and soundness of public pensions, which are not covered by ERISA or similar laws.

III. ONLY THIS COURT CAN RESOLVE THE CONFUSINGLY DIFFERENT WAYS THAT THE STATES DEAL WITH PENSIONERS' CONSTITUTIONAL CONTRACT RIGHTS

Review by this Court is necessary to eliminate widespread disagreement among the states regarding the scope of the protection provided to public employee retirement systems by the federal Contract Clause. Although most states now treat their pension obligations as contractual, they cannot agree on the standards governing their ability to unilaterally modify their side of the deal. The brief allusion in the Petition (pages 25-26) to the fact that the state courts display confusion in dealing with the rights

of public pension plan members discloses only the tip of the iceberg.[27]

The degree of constitutional protection afforded the contractual pension rights of public employees vis-a-vis their employers varies substantially, ranging from none at all to full protection from any unilateral change without the consent of the beneficiary. In between is a construction of the Contract Clause that has been widely described as the "California Rule," [28] which provides that the Contract Clause of the federal Constitution protects state pension obligations, but nevertheless allows the state unilaterally to make reasonable modifications so long as the modification bears some material relation to the purposes of the system and requires any disadvantage to be accompanied by an offsetting advantage. Others say that an exception permitting modification exists only if it will enhance the actuarial soundness of the system. One state has attempted to incorporate parts of three different approaches to the contractual rights of pensioners. Minnesota, which first adopted the strict *Yeazell* theory barring

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[27] Note, *Public Employee Pensions In Times Of Fiscal Distress*, 90 Harv. L. Rev. 992 (1977):

> "according to a 1976 congressional task force, the 'unclear legal status of the participants' rights' has become a 'distinguishing characteristic of governmental pension plans.'"

R. G. Cohn, "Public Employee Retirement Plans—The Nature Of The Employees' Rights," 1968 Ill. L. Forum 32, stating:

> "The blunt fact is that the law [of public employee pension rights] is contradictory and confusing; more disturbingly it is immature, and, with few exceptions, it is based upon contrived and unconvincing logic.
>
> "Despite the contradictions there is a beguilingly deceptive facade of principle. The decisions abound in classic legal concepts. Thus the 'rights' are 'contractual' or 'vested' or 'noncontractual' and 'nonvested'; they are 'gratuities' or earned but deferred compensation'; and depending on the label which is conveniently appended, these 'rights' may or may not be subject to legislative modification."

[28] *See, e.g., Brazelton v. Kansas Public Employee Retirement*, 607 P.2d 510, 518 (Kan. 1980): "We think the California rule as it has evolved is as appropriate to safeguard the interests of government

unilateral changes,[29] thereafter adopted a promissory estoppel theory to protect the constitutional rights of pensioners.[30] Yet, it has determined just this year that there was *no* contract to maintain a pension plan at a level of actuarial soundness.[31] Cases further illustrating this confusion are summarized at Appendix B.

The confusion of these cases is now ominously exacerbated by the California court's decision in *Claypool v. Wilson* (Petition, Appendix A), for it threatens to legitimize efforts by public employers to use the employees' trust funds to balance their budgets. If *Claypool*'s invidious extension of the California Rule for applying the Contract Clause is not corrected, it will encourage other state and local governments to go and do likewise, knowing that their use of public pension funds to balance their budgets does not violate the Contract Clause. Such a governmental invasion of pension funds poses a threat both to the retirement savings of pensioners, and to the pockets of future taxpayers, who must pay later for the underfunded promises of today.[32]

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and its employees in the State of Kansas as in the state of California."

Mullett v. City of Huntington Police Pension Board, 413 S.E.2d 143, 150 (W. Va. 1991) (referring to "what has been recognized as the 'California Rule' ").

Pensions: Public Employee Pension Plans as Contractual Obligations Granted Constitutional Protection, 20 Washburn L.J. 169, 177 (1980), describing the "California rule" and concluding it is "the better approach."

[29] *Sylvestre v. State*, 214 N.W.2d 658 (Minn. 1973).

[30] *See Christensen v. Minneapolis Municipal Employees' Retirement Board*, 331 N.W.2d 740, 750-751 (Minn. 1983) (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983)).

[31] *See Minneapolis Teachers Retirement Fund Ass'n v. State*, 15 Employee Benefits Cas. (BNA) 2289 (Minn. App. 1992), *review denied.*

[32] See citations at note 12, *supra.*

The confusion is likely to spread elsewhere because California's interpretation of the Contract Clause is followed throughout the country. Jurisdictions that have followed and applied the California Rule, or referred to it with approval, include: Alaska, Colorado, Idaho, Kansas, Maryland, Massachusetts, Nebraska, Nevada, Pennsylvania, Vermont, Washington and West Virginia. A list of many of those cases, demonstrating the influence of the California Rule in other jurisdictions, is appended as Appendix C, including citations and brief summaries of the cases.

The lesson of these cases is that, if the decision below (*Claypool v. Wilson*, Petition, Appendix A) is allowed to stand, and the use of pension trust funds solely to balance a state's budget is permitted over a Contract Clause challenge, other jurisdictions throughout the United States that follow California, or approve the modified contract principle originating in that state, or adhere to a less binding rule, will now enthusiastically follow *Claypool*'s lead and invoke it to provide help in times of financial crisis, in violation of contractual rights of pensioners.

CONCLUSION

The size, omnipresence and importance of state and local public pension trust funds underscore the general significance of this case. Moreover, because California case law has so strongly influenced the public pension law of other states in determining the application of the Contract Clause to pensioners' rights in these trust funds, the decision below will have far-reaching bad consequences unless corrected. The increasing frequency of governmental efforts to use these funds for other purposes or otherwise to abdicate their responsibility to meet their pension commitments in favor of current budget-balancing, demonstrates the need for a consistent constitutional analysis to prevent abrogation of those commitments solely to avoid the difficult decisions necessary to balance budgets. The hodge-podge of approaches that now exists

among state courts produces an uncertainty about the future security of public pension funds that can only be stabilized by the intervention of this Court in this case.

The danger that habitual invasion or other use of pension trust funds for operational needs of the employer will continue or increase under the rule of *Claypool* brings a real threat of diminished funding of pension obligations, with two probable results, both potentially disastrous:

(1) money will run out and the pensioners will be unprotected, like the fate that befell Studebaker workers in the 1960's;[33]

(2) money will run out and protected pensioners will turn to that era's taxpayers in the affected local or state jurisdictions, thus imposing a burden on those taxpayers who must ultimately pay for the promised retirement benefits if they are not properly funded.

For these reasons, the *amici curiae* have joined in this brief, urging the Supreme Court to grant certiorari.

Respectfully submitted,

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[33] D. Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 Wis. L. Rev. 65, 73 n.39: "Prior to the enactment of ERISA, many employees lost their pensions completely due to pension plan failures. The most infamous example was Studebaker's inability to meet its pension commitments in the 1960s. . . . The incidence of such tragic cases helped to spur the passage of ERISA." See *Rettig v. PBGC*, 744 F.2d 133, 137 (D.C. Cir. 1984). But public plans are unprotected by ERISA. *See* 29 U.S.C. § 1003(b)(1).

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APPENDICES

APPENDIX A

LIST OF RECENT STATUTORY EFFORTS TO SOLVE LOCAL BUDGET PROBLEMS AT THE EXPENSE OF PUBLIC PENSION TRUST FUNDS

Arizona

Changes in Ariz. Rev. Code § 38-781.05 between 1985 and 1990, which reduced employer contributions by changing the actuarial computation methods from the "entry age normal cost" method to the "projected unit credit" method, a change that reduces current contributions but substantially increases later ones. A similar change was invalidated in the New York *McDermot* case, see page 4a below.

California

1991: In addition to the statute which is the subject of *Claypool v. Wilson* (see Petition, Appendix E, pp. 61a *et seq.*), the Orange County Board of Supervisors unilaterally reduced contributions to the Orange County Employees' Retirement Association by $12.4 million, drawing upon the pension fund's reserve. See Los Angeles Times (Orange County edition) July 28, 1991, part B, p. 1, col. 5 ("Orange County supervisors took $12.4 million that they do not yet have and used it to balance their proposed budget . . .").

Colorado

Colorado Firefighters: Colo. Rev. Stat. §§ 31-30-1014 (2)(b) and (5) reduce the amount of funds (1) contributed to the death and disability fund and (2) transferred to the pension fund to assist in retiring the unfunded liability.

Connecticut

June 5, 1991 Conn.Pub. Acts 191-3: The Legislature approved a $190 million reduction in the state's scheduled

contribution to the employees' retirement fund as part of a solution to the state's deficit.

District of Columbia

The mayor of Washington submitted a proposed budget for fiscal 1993 that requested an appropriation to pay the Retirement Funds $44 200,000 *less* than the amount certified by the Board, in violation of the D.C. Retirement Act section 142 (c)(2), D.C. Code section 1-722 (c)(2). The D.C. Retirement Board filed suit against the mayor (D.C. Superior Ct. No. 92-CA04615), but the matter was eventually resolved satisfactorily by Congressional appropriation in the full amount, despite the mayor's budget proposal to solve her budget problems by underfunding the retirement plan.

Illinois

In 1990 the legislature enacted a statute that allowed the Chicago Board of Education to divert a property tax levy, previously dedicated to the local teacher pension system, to the general education fund for the duration of labor agreement, with Chicago Teacher's Union (scheduled to expire 8-31-93). See *Chicago Tribune*, Nov. 30, 1990, CHICAGOLAND pg. 1: "In a 68-46 vote that included Republican support, the Democrat-dominated House followed the lead of the Senate two weeks ago in approving the proposal for the board to divert tax revenues, primarily earmarked for teacher retirement, to fund teacher pay increases during the next three years."

Illinois State Retirement Systems: P.A. 87-14, effective July 25, 1991. Before the enactment of this statute, the proceeds of the sale of properties which escheat to the state were required to be paid into a special "State Pension Fund" in the State Treasury, for the benefit of state-funded pension systems. The statute permitted the Governor (until July 1992) to transfer any money in this account instead to the general revenue fund. Acting

on this authority, the Governor transferred $21 million to the general fund. This transfer is currently being challenged in the Illinois Supreme Court. *See People ex rel. Sklodowski v. State*, Illinois Supreme Court No. 72451, Plaintiffs/Appellants' Opening Brief at 9, "Statement of Facts," stating in part:

> "This is an appeal of the lower court's refusal to enjoin the Governor from transferring $21 Million from the State Pensions Fund legally committed to reducing the unfunded deficit in the State Retirement Systems, to the General Revenue Fund (general spending).
>
> * * * *
>
> "The Governor and Legislature, for the fiscal years 1990 and 1991 alone, budgeted and appropriated approximately $528 million less than the minimum contribution required for those years by P.A. 86-273. In the 1992 appropriation the Defendants cut pension funding by at least $30 million, ensuring that the State will not meet the minimum required by P.A. 86-273. See Comptroller's press release, Exhibit 3 to Plaintiffs' Amended Brief in Support of Injunction Against Comptroller's Transfer of Money From State Pension Appropriations to General Spending, R.C128."

One of the two "Issues Presented for Review" in that brief is as follows:

> "Is the Governor's designation and direction to transfer $21 Million from the State Pensions Fund (whose monies are legally committed to be contributed to the State Retirement Systems) to the General Revenue Fund (for spending upon general state purposes) an invalid impairment of pension rights in violation of Art. XIII, § 5 of the 1970 Illinois Constitution, or an impairment of pension contract rights under the contract clauses of the federal and state Constitutions, and should the transfer be enjoined?

Louisiana

Act No. 1038 of the 1991 Regular Session of the Louisiana Legislature, amended various statutes relative to the Louisiana Public Retirement Systems' Actuarial Committee. The legislation changed the composition of the trustees' actuarial committee to include more political officers, granted all political officers (or their designates) voting power and removed the voting power of the actuaries selected by the membership; thus only one actuary (employed by the legislature) has voting power. The statute also deleted a previous provision requiring unanimity of all actuaries for any action; the actuarial committee now can take action without the consent of any actuary.

Maine

Chapter 591, H.P. 1393-L.D. 1979 provides for the "deapportionment" of $87 million in employer contributions from teachers' retirement and state General Fund employees' retirement.

New York

N.Y. C.L.S. Retire. & S.S. Act § 23 sought to divest public employees' contract rights by substituting for the long-estabished aggregate cost funding method the projected unit credit funding method, thus substantially reducing current years' contributions but increasing those in later years. This statute was invalidated by *McDermot v. Regan*, 587 N.Y.S.2d 533 (1992).

Texas

Teacher Retirement System of Texas: Article 21, SB 3, 72nd Texas Legislature, effective date: August 22, 1991. Delay in statutory June, July and August 1993 contributions until September 3, 1993, with interest. Legislation passed to delay state contributions during June, July and August, 1993, to September, 1993 (third delay in

the past decade), with interest at 8%. Also, reduced employer contribution rate to 7.31% (instead of the 7.47% that the trusts' actuaries determined to be appropriate); difference between the two rates was $40 million.

Vermont

1990 and 1991: Legislature approved state contributions of $18 million less than the amount requested by the pension fund trustees. *See* N.Y. Times article, n.23 *supra*, quoting the State Deputy Treasurer.

APPENDIX B

CASES ILLUSTRATING CONFUSION CONCERNING ABILITY OF LEGISLATURES TO MODIFY CONSTITUTIONALLY PROTECTED CONTRACTUAL RIGHTS OF EMPLOYEES IN PUBLIC PENSION PLANS

Widespread disagreement exists among the states regarding the scope of the protection provided to public employee retirement systems by the federal Contract Clause. Although most states now treat their pension obligations as contractual, they cannot agree on the standards governing their ability to unilaterally modify their side of the deal.

The degree of constitutional protection afforded contractual rights of public employees vis-a-vis their employers varies substantially, ranging from none at all to full protection from any unilateral change without bilateral agreement—*i.e.*, the consent of the beneficiary. The following cases illustrate four areas of confusion:

1. NO MODIFICATIONS PERMITTED WITHOUT BILATERAL AGREEMENT

Association of Pennsylvania State College & University Faculties v. State System of Higher Education, 479 A.2d 962 (Pa. 1984)—Challenged statute required all state employees to make an additional one and one-quarter percent (1¼%) contribution to the State Retirement System without any offsetting advantages. As to employees whose contractual rights were vested prior to the statute's enactment, the court found that the statute's "Constitutional infirmity . . . was clear," since it was a unilateral modification adverse to its members. Additionally, relying on both—*conflicting*—views expressed in *Catania v. Commonwealth of Pennsylvania*, 450 A.2d 1342 (Pa. 1982), p. 8a *infra*, the court held the "Conclusion that [the statute] is unconstitutional as applied to employees . . . whose retirement benefits had not yet vested . . . is also unavoidable."

Yeazell v. Copins, 402 P.2d 541, 544-47 (Ariz. 1965)—Court held that an employee's contractual rights to pension benefits arose "at the moment of entrance" into public employment and that those rights could not later be modified without the employee's assent.

Jimmie "Red" Jones, Auditor of the State of Arkansas v. James Orville Cheney, 489 S.W.2d 785, 790 (Ark. 1973)—Court determined that an employee who was eligible to retire prior to a modification that changed the terms of his pension system's service requirement (from 15 years combined service at three state agencies to 10 years service at any one of the same three agencies) would not be deprived of his pension on account of the modification; ruling based on proposition that Legislature cannot break the bonds of contractual obligations ("It was certainly not within the constitutional power of the legislature to enact legislation which operated retroactively so as to affect the contractual relationship between the Retirement System and [plaintiff] created before the passage of the [statutory change]." Court expressly distinguished Legislature's ability to amend plan with respect to persons entering retirement system after the amendment's enactment. *See* App. B, section 3, *infra*.

2. MODIFICATIONS PERMITTED IF DISADVANTAGE TO EMPLOYEES IS OFFSET BY COMPARABLE ADVANTAGE

Mullett v. City of Huntington Police Pension Board, 413 S.E.2d 143, 148, 149 (W.Va. 1991); Under the challenged statute, a longer and more definite period of military service was required to qualify for early retirement credit. The court distinguished between constitutional implications of modifications that affect retired employees ("The legislature may add to but not diminish benefits without running afoul of (the) constitutional prohibition against impairment of the obligation of a contract") and modifications that affect active employees ("[t]o survive constitutional challenge . . . legislative

modifications to a pension plan must be reasonable"). The court felt the proper measure of a modification's "reasonableness" is its effect on the system members as a group rather than on individual members. [*But cf. Sheffield*, p. 13a *infra*, basing result on effect on "particular employee" whose rights are involved.] Finding that the disputed fund was being protected from the potential draining effect of massive early retirement, it concluded the statute created no disadvantage to the active participants in the system.

Singer v. City of Topeka, 607 P.2d 467, 474-476, 487 (Kan. 1980)—Acknowledging that employees have contractual rights prior to actual retirement that are "subject to the protection afforded by the contract clause of the U.S. Constitution," the Court adopted the California rule permitting reasonable changes. The Court chose to measure the "reasonableness" of a change by its effect on employees as a group, and not by its effect upon an individual employee. Thus, it invalidated a statute retroactively requiring firemen and police officers to contribute 7% of their gross pay to the pension fund rather than the 3% previously required on the grounds that the increase was not accompanied by a comparable advantage.

Public Employees Retirement Board v. Washoe County, 615 P.2d 972, 974 (Nev. 1980)—Court started with view that "Public employment contracts are within the ambit of the contract clause;" then adopted a rule prohibiting modifications that would eliminate or substantially impair an employee's contractual rights. However, the court held that reasonable modifications to maintain actuarial soundness would be permitted as long as any disadvantage to employees was accompanied by comparable new advantages. Applying these criteria to a statute that removed existing employees from an early retirement provision, the court concluded that the statute's retroactive application was unreasonable.

Catania v. Commonwealth of Pennsylvania, 450 A.2d 1342, 1349, 1354 (Pa. 1982)—Court invalidated a freeze

on the "final average salary" used to determine retirement benefits for judges because it offered no comparable advantage to offset disadvantages but upheld reduction in benefits to judges because it was accompanied by comparable advantage in the form of proportional reductions in contributions. However, the court was unable to reach a decision on the constitutionality of applying the changes to judges who were not yet eligible for retirement. Three Justices felt that changes enhancing actuarial soundness of fund and offset by comparable new advantages were permissible. ("Changes can be applied . . . without violating . . . the United States Constitution."). The three other participating judges would have held any unilateral reduction of retirement benefits unconstitutional ("That such an approach might violate the U.S. Constitution . . . does not appear to present a problem for those who would deny summary judgment").

Halpin v. Nebraska State Patrolmen's Retirement System, 320 N.W.2d 910, 916 (Neb. 1982)—The court found that a statute which suddenly excluded leave payments, formerly included in pension calculations, impaired state patrolmens' contractual rights. The court then had to determine whether the impairment was forbidden by the Constitution since an "impairment is not necessarily unconstitutional. [I]t may yet pass constitutional muster if it is 'both reasonable and necessary' to 'serve an important public purpose.'" Because the statute served no "important public purpose" or "vital state interest," it was invalidated.

Burlington Fire Fighters' Ass'n v. City of Burlington, 543 A.2d 686, 690 (Vt. 1988)—Plaintiffs failed to show that legislation "created a constitutional impairment of their contract" particularly since requirement of retroactive contributions was offset by retroactive effect of increased benefits.

Brazelton v. Kansas Public Employees Retirement Sys., 607 P.2d 510 (Kan. 1980)—Invalidated retroactive appli-

cation of statute that eliminated interlocking of retirement contributions and benefits to social security contributions and benefits because it resulted in increased contributions without offsetting advantages, and thus was "an unconstitutional violation of the Contract Clause of the United States Constitution."

Opinion of the Justices to the House of Representatives, 303 N.E.2d 320, 321 (Mass. 1973). When asked by the House of Representatives whether "the enactment of [a specific bill would] destroy or impair the obligation of a contract protected by Article 1, section 10 of the Federal Constitution," the court replied that the bill, which increased, from 5% to 7%, employees' contributions to a state retirement system would, in the absence of any countervailing important public purpose, unreasonably diminished the members' rights to their retirement benefits which are protected by the Federal Constitution's impairment-of-contract clause.

3. MODIFICATIONS PERMITTED TO ENHANCE ACTUARIAL SOUNDNESS

Jones v. Cheney, 489 S.W.2d 785, 790 (Ark. 1973)—Court determined that an employee who was eligible to retire prior to a modification that changed the terms of his pension system's service requirement (from 15 years combined service at three state agencies to 10 years service at any one of the same three agencies) would not be deprived of his pension on account of the modification; ruling based on proposition that the Legislature may strengthen the actuarial fibers but it cannot break the bonds of contractual obligations ("It was certainly not within the constitutional power of the legislature to enact legislation which operated retroactively so as to affect the contractual relationship between the Retirement System and [plaintiff] created before the passage of the [statutory change]."

Blackwell v. Quarterly County Court of Shelby County, Tennessee, 622 S.W.2d 535, 542 (Tenn. 1981). Change

to the benefit base in a county retirement plan (from average of five highest consecutive years' salary or last 12 months salary to average of three highest years) that resulted in potential reduction in benefits for most employees upheld under "Pennsylvania" rule permitting reasonable modifications to enhance actuarial soundness as long as employees eligible to retire or already retired are not adversely affected. Contrast to California rule (*Allen*) requiring comparable advantage. *Illustrates Confusion*: First, the trial court following California rule held the modification unconstitutional. Then, the Court of Appeals, relying on Article 1, section 10 of the United States Constitution, applied strict principles of contract law and held that no changes could be made that were detrimental to any employee—whether of retirement age or not. Supreme Court ultimately ruled that both lower courts were wrong.

Simpson v. North Carolina Local Gov't Employees' Retirement System, 363 S.E.2d 90, 94 (N.C. 1987)—Court adopted rule that public employees' rights to retirement benefits are contractual. It then remanded for a determination of whether a statute that altered the method of calculating disability benefits "is violative of the Contract Clause because it is reasonable and necessary to serve an important state interest" because the trial court had not properly resolved the issue.

4. MODIFICATIONS WHERE RIGHTS BASED ON PROMISSORY ESTOPPEL

Christensen v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740, 747, 750 (Minn. 1983). The pensions of nine public employees, who had already retired and were collecting pensions, were suspended under a statute that imposed a new minimum age requirement (60) for eligibility. The court invalidated the statute, as to those nine employees, using the test developed by the Supreme Court "to determine when a contractual

impairment is unconstitutional" (*id.* at 750) and characterizing the employees' interest "in terms of promissory estoppel" (*id.* at 747).

Minneapolis Teachers Retirement Fund Ass'n v. State of Minnesota, 15 Employee Benefits Cas. (BNA) 2289 (Minn. App. 1992)—In determining whether a modification to the funding method for a state retirement plan was constitutional or whether it operated as a substantial impairment of a contractual obligation, the court first held that public employees have protectable rights to pension plan benefits arising from the doctrine of promissory estoppel, but then held that the contract contained no provision guaranteeing the actuarial soundness of the plan.

Contrast *Valdes v. Cory*, 189 Cal.Rptr. 212, 222 (Ct. App. 1983), where the California Court of Appeal did find a constitutionally protected implied right to an "actuarially sound pension system" despite the fact that "The current provisions of the retirement law contain no explicit legislative commitment to an actuarially sound system."

APPENDIX C

BELOW ARE SUMMARIZED CASES FROM STATES FOLLOWING OR APPROVING THE "CALIFORNIA RULE" OF FLEXIBLE COUNTERBALANCING CONTRACTUAL OBLIGATION AND REFERRING TO *Allen v. City of Long Beach*, 287 P.2d 765 (Cal. 1955) OR *Betts v. Board of Admin.*, 582 P.2d 614 (Cal. 1978) OR BOTH.

Alaska

1. *State ex. rel. Hammond v. Allen*, 625 P.2d 844 (1981)—Repeal, by referendum, of statute creating special retirement system for elected public officials does not affect rights of elected officials participating in system prior to its repeal from enjoying benefits of that system (citing *Betts* for proposition that contractual rights of members of public employment retirement systems are vested).

2. *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057-58 (1981)—Statute that reduced the occupational disability benefits and occupational death benefits of public safety employees held invalid because it resulted in disadvantage to public safety employees without being accompanied by comparable new advantages (citing and following *Allen* and *Betts* for that proposition).

3. *Sheffield v. Alaska Public Employees Ass'n*, 732 P.2d 1083 (1987)—Employees' early retirement benefits may not be computed according to actuarial factors adopted after employment commenced, if such computation reduces employees' benefits (following, at 1086, requirement in *Hammond v. Hoffbeck* (and its citation to *Betts, supra*) that determination of diminution of vested rights be made on a case-by-case basis and that any diminution be accompanied by corresponding advantages to the particular employee whose own vested pension rights are involved).

Colorado

4. *Police Pension & Relief Board v. McPhail*, 338 P.2d 694 (1959)—Amendment to city charter provision that repealed escalator provision of police and fire departments pension system (retirees' pension increases geared to active officers' salary increases) could not be applied retrospectively to officers who had already retired before enactment of the amendment. (Citing and following *Allen*, which dealt with "exact" problem presented here, 695-96).

5. *Police Pension & Relief Board v. Bills*, 366 P.2d 581 (1961)—Held the same city charter provision at issue in *McPhail* inapplicable to named officers who retired after enactment of provision, including some who had not reached retirement age prior to provision's enactment, on grounds that changes having substantially adverse effect upon an employee's anticipated pension benefits, whether fully or partially vested, are prohibited (relying on *Allen*, at 584).

6. *City of Aurora v. Ackman*, 738 P.2d 796, 800-01 (1987)—Court upheld ruling that statute could not retroactively require firemen to serve five more years before becoming eligible for retirement benefits since adverse impact of statute was not offset by comparable advantage, relying on *Allen*.

7. *Peterson v. Fire & Police Pension Ass'n*, 759 P.2d 720 (1988)—Court upheld denial, to policemens' widows, of survivorship benefits under City plan based on their eligibility to receive lower benefits under state plan (City plan based on ½ of officer's salary v. State plan limited to ¼ of salary). Court relied on *Bills* (and, thus, *Allen*) for proposition that a monetary loss to participants can only be justified by a corresponding beneficial change in plan. Court found both a benefit to individual participants—the likelihood of receiving continued benefits of state plan outweighed the reduction in their monthly benefits—and a benefit to participants, generally—local funds considered less stable, less sound than state fund.

Delaware

8. *In re State Employees' Pension Plan*, 364 A.2d 1228, 1234-35 (1976)—Court adopted view that pension plan participants were entitled to protection against unreasonable modification of the plan. Court then held that statutes providing for invasion of pension fund to pay benefits to persons who were not plan participants violated constitutional prohibition of impairment of participants' contractual rights. ("The thrust of this argument seems to be that it is permissible to invade the Pension Trust Fund . . . so long as actuarial adjustments may be made by future State contributions thereto. But an impairment plus such provision for future repair does not meet the constitutional guaranty of the Contract Clause of the Federal Constitution. The improper invasion of a trust fund is not excused and made proper by such promises of restitution; and this is especially so when the promises are not binding upon the future General Assemblies which must execute them from year to year.")

Idaho

9. *Hanson v. City of Idaho Falls*, 446 P.2d 634 (1968)—Court upheld statute authorizing cities to establish Policeman's Retirement Funds, funded by employee deductions and municipal contributions. Court cited *Allen* for proposition that employee deductions constitute "compensation" because rights in plans are vested (635, 636).

10. *Nash v. Boise City Fire Department*, 663 P.2d 1105 (1983)—Court invalidated statute which retroactively applied a 3% cost of living adjustment cap for pension benefits on the ground that the statute disadvantaged public employees whose pensions vested prior to the passage of the statute and offered no comparable new advantages, citing and following *Betts* for that proposition.

11. *Deonier v. State Public Employee Retirement Board*, 760 P.2d 1137 (1988)—Disapproved retroactive

application, to named firefighters, of requirement that disability benefits be reduced by workers' compensation benefits as a violation of firefighters' contractual rights. As in *Nash*, court adopted *Betts* analysis. (1141, 1142).

Kansas

12. *Brazelton v. Kansas Public Employees Retirement System*, 607 P.2d 510 (1980)—Invalidated retroactive application of statute that eliminated interlocking of retirement contributions and benefits to social security contributions and benefits because it resulted in increased contributions without offsetting advantages, adopting rule stated in *Betts* (517).

13. *Singer v. City of Topeka*, 607 P.2d 467, 474-476 (1980)—Court invalidated statute retroactively requiring firemen and police officers to contribute 7% of their gross pay to pay the pension fund rather than the original 3% on the grounds that the increase was not accompanied by a comparable advantage (citing in support *Allen*).

Maryland

14. *City of Frederick v. Quinn*, 371 A.2d 724, 727 (1977): Court remanded unilateral divesting by city of police pension fund to determine if modifications were either balanced by comparable benefit to the employee or necessary for the public welfare, relying on *City of Downey v. Board of Admin. Pub. Emp. Retire. Sys.*, 121 Cal. Rptr. 295 (Ct. App. 1975).

Massachusetts

15. *Opinion of the Justices to the House of Representatives*, 303 N.E.2d 320 (1973). In an advisory opinion, the court held that a bill increasing, from 5% to 7%, employees' contributions to a state retirement system would, in the absence of any countervailing important public purpose, unreasonably diminish the state employees' vested rights to their retirement benefits and was thus presumptively invalid.

16. *Dullea v. Massachusetts Bay Transportation Authority*, 421 N.E.2d 1228, 1235 (1981)—Relying on *Allen* for public employer's right to make "reasonable modifications" to a plan, Court held that public agency's withdrawal, after only 37 days, of an enhanced benefit plan was reasonable since plan was too short-lived to create any vested interest.

Nebraska

17. *Halpin v. Nebraska State Patrolmen's Retirement System*, 320 N.W.2d 910, 916 (1982): Exclusion of leave payments from pension calculations resulted in disadvantage to policemen without comparable new advantage, citing *Singer v. City of Topeka* (*supra* p. 16a) for support, which in turn relied on *Allen*.

Nevada

18. *Public Employees Retirement Board v. Washoe County*, 615 P.2d 972 (1980): Court invalidated statute deleting investigators and university police officers from group of officers defined as being eligible for pension benefits, stating that the fact that affected employees would not have to contribute to the fund did not constitute a comparable advantage under *Allen* rule.

North Carolina

19. *Simpson v. North Carolina Local Gov't Employees' Retirement System*, 363 S.E.2d 90, 93 (1987)—citing *Allen*, court adopted contractual view of public pension plans. Case remanded for determination of whether change to formula for calculating disability retirement benefits was reasonable or necessary to serve an important public purpose.

Pennsylvania

20. *Catania v. Commonwealth of Pennsylvania*, 450 A.2d 1342, 1349, 1352 (1982)—Court invalidated a freeze

on the "final average salary" used to determine retirement benefits for judges because it offered no comparable advantage to offset disadvantages (citing *Allen*) but upheld reduction in benefits to judges because it was accompanied by comparable advantage in the form of proportional reductions in contributions. Court was evenly divided as to whether changes in retirement contracts of judges who were not yet of retirement age violated the Contracts Clause. Three Justices felt that changes enhancing actuarial soundness of fund and offset by comparable new advantages were permissible. The three other participating judges would have held any unilateral reduction of retirement benefits to be unconstitutional.

21. *Harvey v. Retirement Board of Allegheny County*, 141 A.2d 197 (1958)—Holding that a statute which increased retirement age for employees dismissed for cause from age 50 to 60 constituted an actuarial change, the Court applied *Allen* and gave it retroactive effect, remanding only for a determination of the question of the cause of the employee's discharge.

22. *Association of Pennsylvania State College & University Faculties v. State System of Higher Education*, 479 A.2d 962 (1984)—Invalidated retroactive application of a statute that required all state employees to make an additional one and one-quarter percent (1¼%) contribution to the State Retirement System and had no offsetting advantages. Court relied on *Catania*, *supra*, as to both vested employees and non-vested employees, noting that the amendment was prohibited under either view expressed in *Catania*.

Vermont

23. *Burlington Fire Fighters' Association and Burlington Fire Fighters' Officers Association v. City of Burlington*, 543 A.2d 686, 689 (1988)—Court upheld amendment to City's pension plan that required retroactive contributions to pension fund in exchange for increased benefits, citing *Allen* and *Bakenhus*, *infra*.

Virgin Islands

24. *Joseph v. Government of Virgin Islands*, 576 F. Supp. 1335 (D.V.I. 1983)—Judges who entered public service while statute enlarging their pension benefits was in effect were contractually entitled to receive benefits of that statute, even though statute was repealed 29 days after becoming effective and even though no judge ever made contribution to pension fund established by statute. Court cited *Betts* for proposition that contractual pension expectations are measured by benefits in effect not only when employment begins but which are conferred during the employee's tenure. It held that the judge's benefits could be enlarged but not diminished.

Washington

25. *Bakenhus v. Seattle*, 296 P.2d 536, 540, 541 (1956)—Court invalidated statute which amended pension benefits for police officers by limiting monthly pension payments to $125 per month because approximately ⅓ of monthly anticipated pension had been removed with no comparable advantage, citing *Allen* as authority.

26. *Vallet v. City of Seattle*, 459 P.2d 407, 411-12 (1969)—Adopting *Allen* rule, Court upheld, as reasonable, escalation provision that supplanted old fixed pension system, on ground that disadvantage of provision (escalator for Inspector's position was keyed to salary of Captain—a lower position) was outweighed by advantage (captain's salary would increase, over time, to level greater than salary of plaintiff, an Inspector, at retirement).

27. *Weaver v. Evans*, 495 P.2d 639, 648-49 (1972)—Relying on rule established in *Allen* and *Bakenhus*, court ordered governor, who had withheld funds allocated to retirement system to meet general funds' obligations, to release those funds to retirement system.

West Virginia

28. *Wagoner v. Gainer*, 279 S.E.2d 636 (1981)—Court invalidated statute which prevented retired judge from receiving pension increases based upon salary increases granted to active members of the judiciary since it unreasonably impaired rights of retired members and served no important public purpose, citing *Betts*.

29. *Mullett v. City of Huntington Police Pension Board*, 413 S.E.2d 143, 150 (1991): Court upheld statute redefining early retirement for policemen because pension funds were being protected for potential draining; thus, there was no disadvantage to pensioner, citing in support *Betts*.